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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 740.

ELLA V. FORE,
Appellant,

v.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. .

ELLA V. FORE,
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v.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Ohio entered on January 14, 1959 denying her Application For Rehearing from the judgment of that Court entered on December 24, 1958, setting aside the judgment of the Court of Appeals for the Eighth District, Cuyahoga County, Ohio (hereafter referred to as Court of Appeals), and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the Supreme Court of Ohio is reported in 168 Ohio St. 363, and the overruling by that Court of Appellant's Application For Rehearing is reported in 32 Ohio Bar No. 3, page 54. The opinion of the Court of Appeals (the trial court) is reported in 151 N. E. (2d) 777 and 79 Abs. 15. The decisions of the Supreme Court of Ohio and that of the Court of Appeals are reproduced in Appendix A hereto.

JURISDICTION.

The judgment of the Supreme Court of Ohio denying Appellant's Application For Rehearing was entered January 14, 1959, and Notice of Appeal was filed in that Court on January 23, 1959. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94; *Hughes v. Fetter*, 341 U. S. 609; *May v. Anderson*, 345 U. S. 528.

STATUTE OF OHIO, THE VALIDITY OF WHICH IS INVOLVED.

The statute of Ohio, the validity of which has been sustained by the final judgment of the Supreme Court of Ohio, the highest court of the state, overruling Appellant's Application For Rehearing, as not being violative of or repugnant to the Constitution and laws of the United States, is Section 2111.02 of the Ohio Revised Code. This statute is set forth in Appendix B hereto.

QUESTIONS PRESENTED BY THIS APPEAL.

The following questions are presented by this appeal:

1. Did the Supreme Court of Ohio, by denying in its judgment of January 14, 1959 Appellant's Application For Rehearing, violate the Full Faith and Credit Clause of the Constitution of the United States, Art. IV, Sec. 1, in which application the claim was expressly made that the judgment of that Court rendered December 24, 1958 construing Sec. 2111.02 of the Revised Code of Ohio so as not to require a child to have a domicile or legal settlement in Ohio was violative of such Constitutional provision?

2. Did the Supreme Court of Ohio, by failing to give full faith and credit in its said judgments rendered respectively December 24, 1958 and January 14, 1959, to the judgment of the Fifth District Court, Parish of Franklin, State of Louisiana rendered April 11, 1958 pursuant to the applicable statutes of that State, violate the said Art IV, Sec. 1 of the Constitution of the United States by holding the mere physical presence of the child in Ohio was sufficient for Ohio to make an award of custody to the exclusion of Louisiana, the domiciliary state?

3. Did the Supreme Court of Ohio, by deciding this case with no bill of exceptions certified by the Court of Appeals, the trial court, bringing up the transcript of testimony and exhibits introduced before the Court of Appeals and therefore with absolutely no facts properly before it and only from the journal entry of the Court of Appeals, which journal entry stated no findings of fact, but only that Court's ultimate conclusions of law by which the Court of Appeals gave full faith and credit to the said judgment of the Fifth District Court, Parish of Franklin, State of Louisiana, and held the judgment of the Probate Court of Cuyahoga County rendered December 2, 1957 void *ab initio*, violate Appellant's right to the procedural due process of law guaranteed in the Fourteenth Amendment to the Constitution of the United States?

4. Did the Supreme Court of Ohio, by its total failure to rule on Appellant's Motion to Strike Material Extraneous and Prejudicial from the brief of Appellee filed with the said Supreme Court of Ohio and that Court's consideration of the said extraneous and prejudicial material, which had not been introduced in evidence before the Court of Appeals, the trial court below, constitute a violation of Appellant's right to the procedural due process of

law guaranteed to Appellant by the Fourteenth Amendment to the Constitution of the United States?

STATEMENT.

1. The Facts.

Ella V. Fore, Appellant, a resident of the State of Louisiana, applied to the Court of Appeals on April 21, 1958 for a writ of habeas corpus for the custody of a three year old child, Donald Peter Fore. Appellant is the paternal grandmother of the child. She had been appointed guardian of the person and estate (Tutrix) of this child by Letters issued by the Fifth District Court, Parish of Franklin, State of Louisiana, April 11, 1958, pursuant to a judgment of that Court dated the same day (Transcript of evidence taken before Court of Appeals, hereinafter referred to as Tr., at pages 50-52). Under the applicable laws of that state (Tr. pp. 47-49), she, the child's paternal grandmother, is the proper guardian (Tr. pp. 47-49). The Louisiana Court also appointed an undertutor, as required by Louisiana law (Tr. p. 52).

This action was brought by Mrs. Fore against one Jakobine Toth, Appellee herein, the maternal aunt of this child. Mrs. Toth was purportedly appointed guardian of the person and estate of this child by Letters issued by the Probate Court of Cuyahoga County, State of Ohio, on December 2, 1957. Her application was granted forthwith "without notice to anyone" (see opinion of Court of Appeals, 151 N. E. 2d 777 at page 779 and as set forth in Appendix A hereto), the application and judgment being dated the same day and no hearing was had on the matter (Respondent's Exhibits 2 and 7 to Tr.). The writ of habeas corpus was issued April 21, 1958 requiring Appellee to show cause why the child should not be given to Appellant

pursuant to the Louisiana judgment. Personal service of this writ was had on Appellee on April 22, 1958.

After a complete record of testimony had been taken, exhibits introduced into evidence, and the case submitted on briefs and oral argument, the Court of Appeals ruled that the Probate Court of the same county and state had absolutely no jurisdiction to make an award of custody and appoint the Appellee as guardian, that such judgment was void *ab initio*, and that full faith and credit must and should be given to the judgment of the Louisiana Court appointing the Appellant the guardian, because the domicile of the child's parents and hence that of the child, was in the Township of Winnsboro of that state and Louisiana was the only state with the jurisdiction to appoint a guardian for the child.

A journal entry embodying that opinion was entered on July 15, 1958. (See the transcript of the proceedings before the Supreme Court of Ohio, hereinafter referred to as R., at p. 19. This journal entry is reproduced in Appendix C hereto.) This order was suspended during the pendency of an appeal taken by the Appellee herein from the judgment of said Court of Appeals to the Supreme Court of Ohio. The appeal was on questions of law, necessitating under Ohio law a full review of the evidence by way of a bill of exceptions bringing up the transcript of testimony. Under Ohio appellate procedure the pleadings and journal entries are sent to the reviewing court by the clerk of the lower court, but the transcript of evidence and exhibits must be embodied in a bill of exceptions certified to be correct by the court whose judgment is to be reviewed. See Sections 2321.01 to 2321.12 of the Ohio Revised Code. The failure to prepare and file such a Bill of Exceptions necessitates a dismissal of the appeal: *Viering v. Scott et al.*, 152 Ohio St. 211, 212;

De Moss v. Conart Motor Sales, Inc., 149 Ohio St. 299; *State ex rel. Schneider v. Blythin*, 157 Ohio St. 66; *State ex rel. Novak v. Bright*, 165 Ohio St. 363. No such bill of exceptions was ever filed in the Supreme Court of Ohio. See 168 Ohio St. at page 372 and the certification of Clerk of Court of Appeals certifying Tr. etc. to this Court.

Appellant herein filed a motion to dismiss the appeal (R. p. 12) because the Supreme Court of Ohio had no facts before it, and a motion to strike material extraneous and prejudicial from the brief filed by Appellee in the Supreme Court of Ohio. (R. p. 10.) The motion to strike material extraneous and prejudicial was never ruled on by that Court, and the motion to dismiss the appeal was only ruled upon in its opinion (168 Ohio St. 363 at 372) in which the Court held a bill of exceptions to be unnecessary. After oral argument in the Supreme Court of Ohio, Appellee, in an effort to rectify her failure to file a bill of exceptions bringing up the transcript of testimony taken before the Court of Appeals to the Supreme Court of Ohio, filed a motion (a copy of which has been certified to this Court by the Clerk of the Court of Appeals) in the Court of Appeals to vacate his judgment dated July 15, 1958 so as to give her time to file a bill of exceptions within the statutory period. This motion was denied (see the journal entry denying this motion certified by the Clerk of the Court of Appeals). The Supreme Court of Ohio determined this case upon the journal entry of the Court of Appeals alone (168 Ohio St. 363 at 372), which sets forth absolutely no facts but only the ultimate conclusions of law of the Court of Appeals (R. p. 19 and Appendix C hereto). Since no bill of exceptions was filed by the Appellee herein in the Supreme Court of Ohio taking up the transcript of the evidence taken before the Court of Appeals, it has been necessary

for the Clerk of the Court of Appeals in response to a precipe to certify the transcript of the evidence and certify other items of evidence separately from the record certified by the Clerk of the Supreme Court of Ohio pertaining to the proceedings in that Court.

In its opinion the Supreme Court of Ohio held that it is not necessary for a child to have a legal settlement or domicile in Ohio under Section 2111.02 of the Ohio Revised Code for the Probate Court to have jurisdiction to appoint a guardian. The syllabus of the case which, under Ohio law is the law of the case, expressed by the Court, reads:

> "1. Where there is no existing award of custody of an orphaned minor resident of Ohio by a foreign court, the Probate Court of the county of such residence has jurisdiction, under Section 2111.02, Revised Code, to appoint a guardian of the minor, irrespective of the fact that the domicil of such minor may be in another state.
>
> "2. A decree of guardianship of a minor resident of Ohio by a court in a state where the child has a technical domicil, which decree is made without personal service on either the child or the person with whom such child is living, is not entitled, under Section 1, Article IV of the Constitution of the United States, to such faith and credit as will nullify the prior appointment of a guardian of such minor by the Probate Court of the county of his residence."
>
> 168 Ohio St. 363.

Thereupon, Appellant filed an Application For Rehearing (R. p. 34) which was denied without opinion. Well may we ask, without a bill of exceptions before it how the Supreme Court of Ohio could have known there was "no existing award of custody." In fact there was outstanding an existing award by Mississippi which had never

been litigated in Ohio. How also, with no facts before it could the Court have found the child was a "resident" of Ohio? The Court of Appeals had ruled to the contrary (see below).

Upon Appellant's Motion, the Supreme Court of Ohio stayed the issuance of its mandate until all matters are disposed of by the Supreme Court of the United States (R. pp. 6 and 7).

Donald Peter Fore, the minor whose custody is the subject of this litigation, is the son of Donnie R. Fore, a.k.a. Donald R. Fore, and his wife, Francaska Haas Fore (Tr. p. 40). They were both killed as a result of a common disaster in Ingrandes, France, September 7, 1957. The father was a Master Sergeant in the United States Army. The mother was a German girl whom he married in 1952, and who was a naturalized citizen of the United States. Master Sergeant Fore was a resident of Winnsboro, Louisiana, and was born there December 19, 1922 (Tr. pp. 4, 14). He enlisted in the United States Army in 1941 and had served continuously in the Army ever since (Tr. pp. 1-10). Consistently, his Army record has always shown him listing Winnsboro, Louisiana as his permanent address (Tr. pp. 1-10). His wife was also a resident of Winnsboro, Louisiana (Tr. p. 10), and neither had ever set foot in the State of Ohio (Tr. p. 109). It was Sergeant Fore's intention to return to Winnsboro, Louisiana, and build a home there upon his release from overseas duty (Tr. pp. 15 and 28).

On October 18, 1957 the Chancery Court of Amite County, Mississippi, appointed Mrs. Ida Fore Tillery, a sister of Master Sergeant Fore, the legal guardian of the child under the laws of that state. The child being in France, there remained the problem of transporting him

to the United States to Mrs. Tillery who, at that point was the only person who had been appointed guardian by a court of any jurisdiction (Tr. p. 115).

On October 21, 1957, the Adjutant General of the United States directed a telegram to Mrs. Tillery asking whether she would meet her nephew (Tr. p. 46). Mrs. Tillery immediately replied that she would and requested delivery of the child if possible at Jackson, Mississippi.

On October 25, 1957, Mr. Fred A. Anderson, Jr., a Mississippi Attorney, was informed by Colonel Charles M. Munnecke, Chief, Legal Assistance Division, Department of the Army, Washington, D. C. that the child had been delivered to Jakobine Toth, a resident of Cleveland, Ohio, "to escort" him to the United States (Tr. p. 46). Mr. Anderson strenuously objected to this procedure, and was advised by Colonel Munnecke by telephone that the child would arrive at Idlewild Airport, New York. (Tr. p. 46).

The child being in the hands of Appellee, who had flown over to Europe and returned with the child on November 18, 1957 (Tr. p. 78), Mrs. Tillery brought an action in habeas corpus in the Supreme Court of New York for custody of the child. The writ was denied (Tr. p. 78). The Appellee proceeded to Cleveland, Ohio, with the child and as stated above was awarded custody of him by the Probate Court of Cuyahoga County on December 2, 1957. Thus, exactly fifteen days intervened between the child's arrival in the United States and the *ex parte* Ohio award of custody. As the Court of Appeals said in its opinion (151 N. E. 2d at 781), "There is no claim here that Donald Peter Fore had a 'legal settlement' in Cuyahoga County nor do the facts justify a determination that he was, when the action was commenced, a *resident* of this State." (Emphasis supplied.)

2. How the Federal Questions are Presented.

As shown by the transcript of the proceedings before the Supreme Court of Ohio (R. p. 34) Appellant applied for rehearing from the judgment rendered by the Supreme Court of Ohio on December 24, 1958 in this case making the claim that this decision contravened the Full Faith and Credit Clause of the United States Constitution, that the decision by that Court with absolutely no facts before it was in derogation of Appellant's rights to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution, and that its failure to rule on Appellant's Motion to Strike material extraneous and prejudicial from the brief filed by Appellee in that Court together with its consideration of the same, which consisted of a purported transcript of testimony taken before the Supreme Court of New York, which had never been introduced in evidence before the trial court, the said Court of Appeals, was also in derogation of Appellant's right to the procedural due process guaranteed by that Amendment.

Appellant's claim in her Application for Rehearing that the Full Faith and Credit Clause of the United States Constitution had been violated rests on the construction the Supreme Court of Ohio gave to Section 2111.02 of the Ohio Revised Code. Previously it had been held in all of the Ohio cases that a child must have a domicile in the county in Ohio in which the Probate Court was situated for it to have jurisdiction to appoint a guardian. The Court of Appeals consistently with these decisions so held. In this case the Supreme Court of Ohio, for the first time, held a domicile or legal settlement in Ohio to be unnecessary to give an Ohio Probate Court jurisdiction to appoint a guardian, and interpreted the word "residence" in the statute so as not to mean "domicile" as had always

been held. This interpretation of Section 2111.02 violates the Full Faith and Credit Clause of the United States Constitution as it construes it so as to prevent the recognition by Ohio of the rights of the domiciliary state and its valid judgment, given pursuant to its statutes, which are entitled to full faith and credit under the United States Constitution, Article IV, Section 1.

On her Application for Rehearing Appellant expressly claimed that the statute as so construed contravened the Full Faith and Credit Clause. (R. pp. 41, 51.) Thus the claim was squarely presented to the Supreme Court of Ohio that the statute was void under Article IV, Section 1 of the United States Constitution.

3. **The Federal Questions Were Properly Raised.**

Thus, these Federal questions were raised at the first opportunity presented for Appellant to raise them since until the Supreme Court of Ohio ruled as it did they could not have been raised, the decision of the Court of Appeals having been in Appellant's favor. When the claim is so presented this Court has held that the Federal questions are timely raised, even though the application for rehearing is summarily denied without reference to the Federal questions. See, *Great Northern Ry. Co. v. Sunburst Oil Co.*, 287 U. S. 358, 366-7; *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 677-8; *Ohio ex rel. Bryant v. Akron Park District*, 281 U. S. 74, 79; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 320; *Saunders v. Shaw*, 244 U. S. 317, 320; *Cole v. Arkansas*, 333 U. S. 196, 200; Cf. *American Surety Co. v. Baldwin*, 287 U. S. 156, 162-4; *Wilson v. Cook*, 327 U. S. 474, 485.

The claim that Appellant was entitled to the child under the laws of Louisiana and that the order of the

Probate Court of Cuyahoga County, Ohio was void *ab initio* was raised in Appellant's Petition for Writ of Habeas Corpus filed in the Court of Appeals and that Court's judgment as stated in its journal entry (Appendix C hereto) was that the Ohio decree of custody was void *ab initio*, and that full faith and credit must and should be given to the Louisiana decree, and the Supreme Court of Ohio expressly ruled otherwise on this question in its decision, 168 Ohio St. at 371-372.

THE QUESTIONS ARE SUBSTANTIAL.

The federal questions involved in this appeal are:

(1) May a state interpret its statute governing the appointment of guardians so as to deny to the state of a child's domicile the right to have its valid judgments accorded full faith and credit by such state? May a state deny Full Faith and Credit to the valid judgment of another state in the circumstances of this case where the child whose custody is sought was brought into Ohio by no legal right or authority and immediately and summarily and without Notice the Appellee was appointed his guardian?

(2) May a state appellate court render a judgment reversing a lower court with no legitimately presented facts before it on which to base its decision without offending the procedural due process of law guaranteed in the Fourteenth Amendment to the United States Constitution?

(3) May a state appellate court consider as evidence an unauthenticated transcript of testimony in another and extraneous matter, which transcript was never introduced in evidence or made a part of the record in the case without denying that due process of law guaranteed in the said Amendment?

These questions are indeed substantial and present important questions needing clarification and emphasis by this Court.

This case is directly appealable under the rule of *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94 and *Hughes v. Fetter*, 341 U. S. 609. As was true in those cases, in this case it is claimed and was claimed before the Supreme Court of Ohio on application for rehearing, a state statute has been construed by the highest state court so as to offend a provision of the Constitution of the United States. In *Kedroff v. St. Nicholas Cathedral* it was claimed the New York statute as construed violated the Fourteenth Amendment and in *Hughes v. Fetter*, the claim was that the state statute as construed violated the Full Faith and Credit Clause. See also *May v. Anderson*, 345 U. S. at page 530.

Beside Appellant's claims to the right of direct appeal under the above authorities, Appellant has the right to petition for a writ of certiorari both on the grounds that the Full Faith and Credit Clause was violated by the Supreme Court of Ohio and that procedural due process of law was denied her by that Court, under Title 28, United States Code, Section 1257(3). Rather than filing a petition for certiorari in addition to appeal papers, these questions are included herein on the authority of *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 547 and *Flournoy v. Wiener*, 321 U. S. 253, 263.

The First Constitutional Question.

Unquestionably in this case the child's domicile was Louisiana, nor does the opinion of the Supreme Court of Ohio dispute it. Yet, contrary to the authorities it has construed the word "residence" as used in Section 2111.02

of the Ohio Revised Code not to mean "domicile," and by this means it refuses to recognize the decree of the only state having the jurisdiction to appoint a guardian, the state of the child's domicile, Louisiana. The child having been brought into Ohio under no valid right and having been in the United States a mere two weeks when Appellee was appointed his guardian it would certainly appear that the Court of Appeals was correct in stating he did not even have a "residence" in Cuyahoga County, Ohio, 151 N. E. 2d, 777, 781.

Until this case was decided, Section 2111.02 of the Ohio Revised Code and its predecessor statutes had always required that in order for a guardian to be appointed for a child the *child* must have a domicile in the county in Ohio of the Probate Court. See, *Lessee of John R. Maxson v. Sawyer*, 12 Ohio 195 (1843); *In Re Hampshire*, 17 O. App. 139 (1922); *In Re Guardianship of James Edward Murray*, 4 O. N. P. (N. S.) 233 (1906), affd. in 8 O. C. C. (N. S.) 498, and *In Re Clayton*, 61 Bull. 355 (1916). Such is the rule of the *Restatement of Conflict of Laws*, §§ 117, 144, 149 and 151.

As stated in § 117, entitled "Guardianship of The Person" the rule is that:

> "A state can exercise through its courts jurisdiction to determine the custody of children or to create the status of guardian of the person only if the domicil of the person placed under custody or guardianship is within the state."

See also 25 *Am. Jur.*, pp. 22-23 wherein it is said:

> "The probate court within the territorial district of which the ward has his legal domicil has primary jurisdiction to appoint the guardian. The word 'residence,' as used in statutes relating to the appointment of guardians, has been construed to mean the

domicil of the ward, and it is the prevailing view that legal domicil within the district is sufficient to confer jurisdiction; although the infant or incompetent at the time is residing elsewhere, provided, it seems, that authority to exercise such jurisdiction has been conferred by statute."

In *Commonwealth ex rel. Graham v. Graham*, 80 Atl. 2d 829, 367 Pa. 533, the Court held at page 832:

"Jurisdiction of a court in a proceeding involving custody is determined by the domicile or residence of the child. *Commonwealth ex rel. Rogers v. Daven*, 298 Pa. 416, 148 A. 524; *Commonwealth ex rel. Sage v. Sage*, 160 Pa. 399, 28 A. 863; *Commonwealth ex rel. Camp v. Camp*, 1942, 150 Pa. Super. 649, 29 A. 2d 363; *In re Rosenthal*, 103 Pa. Super. 27, 157 A. 342; *Commonwealth ex rel. Bich v. Bich*, 73 Pa. Super. 268; *State ex rel. Larson v. Larson*, 1934, 190 Minn. 489, 252 N. W. 329; Restatement, Conflict of Laws, Sections 117, 145, 146. A court which does not have jurisdiction of the child, does not have jurisdiction of the subject matter to determine the right of custody as between the parties. *Commonwealth ex rel. Rogers v. Daven, supra; Commonwealth ex rel. Camp v. Camp, supra; Gilman v. Morgan*, 158 Fla. 605, 29 So. 2d 372, certiorari denied, 331 U. S. 796, 67 S. Ct. 1740, 91 L. Ed. 1822; *Dormon v. Friendly*, 146 Fla. 732, 1 So. 2d 734; *Lake v. Lake*, 63 Wyo. 375, 182 P. 2d 824."

That such is and should be the law is required as a matter of public policy, for if any state other than that of a child's domicile in such circumstances as here, can make an award of guardianship, by an *ex parte* order with "no notice to anyone" (151 N. E. 2d at 779) and with no hearing, and this order may not be set aside as void *ab initio* and full faith and credit given to the judgment of the state of the child's domicile given pursuant to its laws, by such a construction as placed on Section 2111.02 of the Ohio Re-

vised Code, then there is nothing whatsoever to prevent the illicit trafficking in children and the abducting and surreptitiously bringing them into jurisdictions which neither they nor those closest to them have any ties.

If in such a situation the state of the child's domicile is not the one alone to decide custody of infants, we will have nothing but a riot of competing jurisdictions asserting a right of custody based on the most intangible and meretricious of claims upon which to base jurisdiction. In this case, three states appointed a guardian for this child. The first was Mississippi which acted while the child was in Europe; the second was Ohio, into which he was brought by no valid right or order and custody immediately ordered and the third was that of his domicile, Louisiana.

In such a case as this it is for this Court to choose between the competing public policies involved of Louisiana and Ohio under the Full Faith and Credit Clause. *Hughes v. Fetter*, 341 U. S. 609, 611; *Pink v. A. A. A. Highway Express*, 314 U. S. 201, 210.

The United States Supreme Court has never decided this question and it is submitted that in these days when American citizens, whether by reason of Government service or otherwise are situated with their families in places which are not their domiciles but only their temporary residences, this question is worthy of decision by this Court.

The Supreme Court of Ohio in its opinion at pages 371-372 of 168 Ohio St. held that the Full Faith and Credit Clause of the Constitution of the United States does not require that full faith and credit be given to the Louisiana decree because it was not an *in personam* judgment as to Appellee, citing *May v. Anderson*, 345 U. S. 528, and *New York ex rel. Halvey v. Halvey*, 330 U. S. 610. There are significant differences between those

cases and this one. First of all, they were both divorce cases involving the struggle between parents as to the custody of the children and the award of custody was an integral part of the divorce action in each case.

In the *Halvey* case the New York Court had all parties before it, and it was held that New York could modify the Florida decree to the same extent Florida could do so without infringing the Full Faith and Credit Clause. The question of whether in absence of personal service the Florida decree of custody had any binding effect on the husband was not decided in that case (345 U. S. page 533).

In *May v. Anderson* the elemental question was whether a court of a state where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam* (345 U. S. at 533). At the time the divorce decree was obtained in Wisconsin the domicile of the mother was in Ohio (345 U. S. at 534, footnote 7) and the children were not within the jurisdiction of Wisconsin because they were living with their mother in Ohio (345 U. S. 531). Therefore, the domicile of the children was that of their mother, Ohio. As stated in footnote 7, (345 U. S. 534):

> "For the general rule that in cases of the separation of parents, apart from any award of custody of the children, the domicile of the children is that of the parent with whom they live and that only the state of that domicile may award their custody, see Restatement, Conflict of Laws (1934), Sections 32 and 146, Illustrations 1 and 2."

And as stated in part in footnote 8, same page:

> "* * * the weight of authority is in favor of confining the jurisdiction of the court in actions for di-

vorce, where the defendant is a non-resident and does not appear, and process upon the defendant is by substituted service only, to a determination of the status of the parties * * * This rule of law extends to children who are not within the jurisdiction of the court when the decree is rendered, where the defendant is not a resident of the state of the seat of the court, and has neither been personally served with process nor appeared to the action * * *."

It is evident therefore that these cases being divorce cases have no bearing on the instant case, which further emphasizes the incorrectness of the holding of the Supreme Court of Ohio (168 Ohio State, at pages 371-372), that the Full Faith and Credit Clause of the Constitution of the United States does not require that full faith and credit be given to the Louisiana decree, the domiciliary state, in the case now before this Court.

In this case the Appellee is not a parent. See Mr. Justice Frankfurter's statement in his dissent in *Vanderbilt v. Vanderbilt*, 354 U. S. 416, 424 at footnote 1 and the statement in the opinion of the Court of Appeals herein that: "In the case here being considered, it must be remembered that the controversy is not between parents" (151 N. E. 8d 777, 781). This is not a custody matter arising out of a divorce decree. Here there are two paternal aunts with at least equal claims to the child, one of whom had obtained the prior Mississippi decree, which has never been litigated in Ohio. Clearly, however, the person with the best claim to the child is, his paternal grandmother as his natural guardian, *Lehmer v. Hardy, et al.*, 294 Fed. 407.

In the instant case the award of custody to Appellee was rendered by the Probate Court of a state which was not the domiciliary state, in an *ex parte* proceeding with "no notice to anyone." The Louisiana decree was also

made without notice to others. However, it was the domiciliary state of the child and there is no question that a domiciliary court may render such a decreé under appropriate statutes. See the leading case of *State ex rel. Larson v. Larson,* 190 Minn. 489, 252 N. W. 329, and 25 *Am. Jur.* 22-23 above cited. The Louisiana decree awarding custody to Appellant was akin to a judgment *in rem.* See, *State ex rel. Larson v. Larson, supra,* at page 330 of 252 N. W., and *Naylor v. Naylor,* 143 A. 2d, 604, 609, 217 Md. 615. Louisiana having jurisdiction of its domiciliary, the child, its judgment awarding custody to Appellant is a valid judgment, and the Constitution of the United States requires Ohio to honor it, especially since the child had no tie to Ohio other than that obtained by his being transported into the state and being physically present therein.

The Supreme Court of Ohio's construction of Section 2111.02 Ohio Revised Code makes the procedure for the appointment of a guardian used in this case possible for the first time by an Ohio probate court as before this case the law of Ohio, as above stated, had required the child to have a domicile in the state. Under the Juvenile Court Act of Ohio its juvenile courts have the power to protect helpless and dependent children (Sections 2151.01 *et seq.* of the Ohio Revised Code). The statement of Mr. Justice Jackson in his dissent, joined in by Mr. Justice Reed in *May v. Anderson, supra,* page 539, is particularly apt in this case:

> "A state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system."

For a recent decision to the same effect and which reviews the authorities on the subject see *Naylor v. Naylor*, *supra*, 610.

The Second Constitutional Question.

As before stated there were no facts before the Supreme Court of Ohio when it decided this case. Because no bill of exceptions signed and certified by the Judge of the Court of Appeals taking up the transcript of the evidence to the Supreme Court of Ohio, as is required by the law of Ohio was filed with that Court, that Court had no facts before it. In short it decided the case in a *vacuum*. In its opinion the Supreme Court of Ohio stated, 168 Ohio St. at page 372:

> "Since the error which is the basis of this reversal is apparent from the entry of the Court of Appeals, it is not necessary to our decision that there be a bill of exceptions. The Motion of Appellee to dismiss the appeal is therefore overruled."

Yet the journal entry of the Court of Appeals states no facts but only that Court's conclusions of law. (R. p. 19 and Appendix C hereto.)

Such a complete disregard of the statutes and decisional law of Ohio and the due administration of justice as to the necessity of a review of the facts on appeal is an arbitrary denial of the procedural due process guaranteed in the Fourteenth Amendment. For instance, this Court in *Chessman v. Teets*, 354 U. S. 156, held that the affirmance by the state supreme court of the petitioner's conviction upon a seriously disputed record could not be allowed to stand in the face of this constitutional guarantee. In that case there was at least *some* record before the state

supreme court upon which it could determine facts and render a judgment; in this case, there was *none*.

The Third Constitutional Question.

The Supreme Court of Ohio totally failed to rule on Appellant's Motion to Strike Material Extraneous and Prejudicial from Appellee's brief filed with that Court. This motion was filed September 11, 1958. It can only be assumed that that Court read this "record," the motion having been disregarded. Its disregard of this motion and the consideration of this "record" as evidence which had never been attempted to be put into evidence before the Court of Appeals, let alone properly brought up to the Supreme Court of Ohio as a part of a bill of exceptions, was greatly to Appellant's prejudice and constituted such a flagrant disregard of her constitutional rights as to make it impossible for her to have had the case fairly considered by the Supreme Court of Ohio.

As this Court pronounced in *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 93:

> "* * *—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."

It is submitted that the decision of the Supreme Court of Ohio dated December 24, 1958 and its decision overruling the Appellant's Application for Rehearing dated January 14, 1959 violated the Full Faith and Credit Clause of the United States Constitution and that such decisions violated Appellant's rights guaranteed her by the Four-

teenth Amendment to said Constitution. We submit the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

(No. 35767—Caption omitted.)

Appeal from the Court of Appeals for Cuyahoga County.

There is no substantial dispute as to the facts necessary to a determination of the question raised by this appeal. Donnie R. Fore was born in the state of Louisiana in 1922 and resided there continuously until his enlistment in the United States Army in 1941. He remained in the armed forces until his death, serving in various theaters both in this country and abroad. His last enlistment occurred on May 3, 1956, at which time he was stationed with the army in France. Immediately prior to this overseas service, he had been stationed in the state of Virginia. His wife, whom he had married in Germany in 1952, accompanied him on his last overseas assignment.

On September 7, 1957, Donnie R. Fore and his wife were killed in an automobile accident in France, leaving surviving them a son, Donald Peter Fore, now approximately three years old.

Upon receiving notice of the death of Fore and his wife, the respondent herein, sister of Mrs. Fore and maternal aunt of Donald, went to Germany for her sister's funeral. After several weeks, during which an investigation was conducted by the American Red Cross, an officer of the United States Army in Europe turned the custody of the child over to the respondent.

Upon her return to the United States with the boy, the respondent was served at the airport in New York with a copy of a petition in habeas corpus seeking the release of the boy. That proceeding was instituted in a New York court by a paternal aunt of the boy and was based on letters

of guardianship issued to her by a court in her home state of Mississippi. After hearing, the New York court, on November 25, 1957, refused to release the boy and attempted to award legal custody of hin to the respondent.

Thereupon, the respondent returned with the boy to the home maintained by her and her husband in Cleveland, Ohio. She later filed an application for letters of guardianship of the person and estate of Donald in the Probate Court of Cuyahoga County, naming as next of kin the maternal grandparents in Germany and the petitioner, Ella V. Fore, paternal grandmother, residing in Louisiana. The application was granted by the Probate Court of Cuyahoga County on December 2, 1957.

On April 11, 1958, approximately four months after the letters of guardianship were issued by the Probate Court of Cuyahoga County, an application of petitioner herein, filed in Louisiana and seeking an award of "tutorship" (guardianship) of the person of the boy, was granted.

Ten days later, on April 21, 1958, the petitioner instituted this action in habeas corpus in the Court of Appeals for Cuyahoga County. The Court of Appeals found that "the said Donald Peter Fore is illegally detained by the said Jakobine Toth in her custody by reason that the order entered on December 2, 1957, by the Probate Court of Cuyahoga County, Ohio, in Doc. 555, No. 551269, was void *ab initio* for the reason that the court did not have jurisdiction to appoint the said Jakobine Toth the guardian of the person and estate of said Donald Peter Fore and that full faith and credit is to be accorded the judgment of the Fifth District Court, Parish of Franklin, State of Louisiana, issued the 11th day of April, 1958, appointing the said applicant, Ella V. Fore, guardian of the person and estate of the said Donald Peter Fore."

The cause is before this Court as an appeal of right from the judgment of the Court of Appeals for Cuyahoga County.

There is also before this Court a motion by appellee to dismiss the appeal, on the ground that appellant has failed to file a bill of exceptions.

BELL, J. The petitioner urges that the Probate Court of Cuyahoga County lacked jurisdiction to award custody, by way of guardianship, of Donald, for the reason that at all times material to this controversy his domicil was Louisiana. To reach this conclusion she advances several "rules" of domicil. Briefly summarized, they are:

1. *A married woman takes the domicil of her husband by operation of law.*

2. *A person's domicil is not changed while he is in military service, unless he has most clearly and unequivocally shown an intent to change it.* Donnie R. Fore, the father, was admittedly domiciled in Louisiana prior to his enlistment in 1941. Since he remained in the service until his death, this principle, together with "rule" 1, ascribes to the parents of Donald a Louisiana domicil during their entire lives.

3. *An infant's domicil is that of his parents, particularly that of his father.* This domicil is thrust upon the child "by operation of law," irrespective of the place of birth, of the place of abode, or of any actual choice. Following "rules" 1, 2 and 3, we would be forced to the conclusion that Donald was domiciled in Louisiana until the moment of his father's death.

The judgment of the Court of Appeals refers to a fourth rule, operative immediately upon the death of the parents:

4. *On the death of both parents, a minor takes the domicil of his grandparents.* Since the petitioner is admittedly domiciled in Louisiana, this principle is urged upon us to declare Louisiana as the domicil of Donald.

Working with these "rules" and with the legal conclusion that the court of a minor's domicil has exclusive jurisdiction to award custody of the minor, the majority of the Court of Appeals concluded that Ohio through its courts lacked the power to determine the custody of Donald by appointing a guardian for him.

Although, as a matter of argument, such a conclusion might dispose of the question here under consideration, it could not do so without leaving some serious problems unanswered. In the first place, we are not convinced that these broad statements are given the universal application as contended by the petitioner. See Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale Law Journal 457. But conceding that they should be accorded full validity, we are faced with these questions:

What was the domicil of the mother during the hours she survived her husband (if, in fact she did survive him)? And did her son take that domicil?

The domicil of which set of grandparents, paternal or maternal, is the child's domicil after the death of his parents?

In Stumberg, Conflict of Laws, 49, it is stated that the domicil of a child is that of his grandparents, if he in fact lives with them. See, also, *Lamar, Exr., v. Micou, Admx.*, 112 U. S., 452, 28 L. Ed., 759, 5 S. Ct., 221.

It is undisputed in this case that Donald has never lived with the petitioner.

Conceding further that "rule" 4 above is a correct statement of the general law, and that a child upon the death of his parents takes the domicil of his grandparents.

we may well ask whether a person, other than a grandparent, with whom the child "in fact lives" can change his domicil. In *Loftin v. Carden*, 203 Ala., 405, 83 So., 174, it was alleged and proved, in a controversy between two petitioners for the guardianship of a two-year-old infant, that both its parents and natural guardians were dead, and that the child had been removed into Dale County, at the time the bodies of its parents were taken there for burial, and had remained there in the custody and control of the successful petitioner up to the time of filing the petition. The court in that case said:

"In this case both the father and mother of the infant were dead, and the infant was not of sufficient age to choose a residence or domicile. The appellee in this case being the maternal aunt of the infant, and having the legal custody and control of it, could certainly choose the residence or domicile of the infant which could not choose its own, in the absence of both father or mother or other person having a better right to the custody and control of the infant. So, if it should be conceded that the residence of the infant was ever in Bullock County, the undisputed evidence shows that that residence was changed to that of Dale County when the probate court of that county assumed jurisdiction and appointed a guardian for the infant."

If the reasoning of the *Loftin* case is followed, it may well be that the domicil of Donald is in Ohio by virtue of his Cleveland home with the respondent.

However, we do not believe that the welfare of a child turns on such verbalisms. Unless compelled by some Ohio statute to find to the contrary, we are of the opinion that the Ohio court had the inherent jurisdiction to determine the custody of Donald, irrespective of his domicil. An award of custody is not simply an adjudication of personal rights of individuals in and to a minor; it is a conclusion of

what is best for the welfare of the child. See Stumberg, The Status of Children in the Conflict of Laws, 8 University of Chicago Law Review, 42, 55, where it is said:

"Custody proceedings do not have as their purpose creation or recognition of an aggregate of legal relations, but rather a judicial determination of conflicting claims to the physical control and care of the child. These claims would normally be incidents of the parent-child relationship, and under ordinary circumstances there would be no occasion at all for their assertion in court. It is when the circumstances become abnormal, as where the parents are separated, or there is a divorce, or the parents are allegedly unfit, or are dead, that a situation for judicial cognizance arises. If the case were merely one for determining the merits of the conflicting claims as between the immediate parties, there would be no particular reason for departing from usual concepts of jurisdiction in personam; but the very abnormality of the situation brings into play the further idea that in making his decision, the trial judge should be guided not so much by legalistic formulae as by considerations which have a bearing upon the ultimate interests of the child. Actuated by this thought, a number of courts have held that the interests of the child can be adequately protected at the place where it actually resides and that jurisdiction exists there even though that place may not be the child's technical domicil."

Viewed thus, jurisdiction to reach this conclusion rests on the sovereignty which each state has in standing *in parens patriae* toward children within its borders. This jurisdiction should not be abdicated simply because such a child has a technical domicil in some other state.

Perhaps at one time in the history of this country—before the days of easy and fast transportation—the domi-

ciliary court was the one best suited to determine custody. *Lanning v. Gregory* (1902) 100 Tex., 310. 99 S. W., 542. It was in the domiciliary state that a family lived, grew and died. It was in that state that the child's interests were centered. However, domicil was then the basis of jurisdiction, not because of anything inherent in the word, but because it was the easiest way to describe the state which was closely connected with the welfare of the child.

Such is not necessarily the situation today. Easy modes of transportation and a plentitude of jobs have divided families among several states. Domicil no longer retains its original impact. In custody cases, courts now recognize that the domiciliary court does not have *sole* jurisdiction, and many older precedents have been overruled. Thus in *Wick v. Cox* (1948), 146 Tex., 489, 208 S. W. (2d), 876, the court held:

"The principle underlying jurisdiction of the subject matter in child custody cases is the welfare of society, primarily as evidenced by the welfare of the child, but involving also the right, and, for that matter, the duty, of a state, being the relatively independent sovereign that it is, to look after the welfare of individuals within its borders * * *."

Part of the genius of the law is that old "rules" give way to new ones which better reflect the basic principles which undergirded the former. The basic principle in custody cases is that the state seeking to exercise such jurisdiction must be so closely connected with the welfare of the child that it is in furtherance of *his* interests that his custody be determined in that state. Obviously, such state may be far beyond an assigned domicil.

Applying this basic principle to the case before us, it becomes clear that Ohio's interest is sufficient to uphold its exercise of jurisdiction. The only connection between

Donald and Louisiana rests on a tenuous and a technical idea of domicil. His connections with Ohio, however, are those flowing from an actual residence within Cuyahoga County. We are of the opinion that this residence was sufficient to give Ohio the inherent power to decide the question of Donald's custody.

In *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E., 624, 40 A. L. R., 937, Judge Cardozo said:

"The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. * * * [Cases cited.] For this, the residence of the child suffices, though the domicile be elsewhere * * *".

Indeed, the majority of American cases appear to go further and tend to support jurisdiction if the child is, in fact, *present* within the state. Thus it is said in 4 A. L. R. (2d), 16:

"Where there is no outstanding judicial award of custody by a foreign court the courts are nearly unanimous in holding that even though the children may be domiciled without the state, power in the court exists to make an award of custody of children present in the state in furtherance of the welfare of the children."

However, the facts of the instant case do not require us to go so far.

We do not, of course, suggest that the location of the child's domicil is unimportant in deciding the merits of a custody case. Indeed it may be of prime importance in a decision as to which of two competing persons is to be granted the custody. However, these considerations go to the *merits* of the case and not to *jurisdiction*, which was the basis of the Court of Appeals judgment.

A case very similar in its facts to the present one is *People, ex rel. Noonan, v. Wingate*, 376 Ill., 244, 33 N. E. (2d), 467. There a habeas corpus action was brought in Illinois by the paternal grandmother to obtain custody of a minor from residents of Illinois who had been caring for the minor. Both parents were deceased, the mother having died first. At the time of his death, the father was domiciled in Massachusetts even though he was working in Georgia. The grandmother, who also was domiciled in Massachusetts, was appointed guardian by a Massachusetts court. In the habeas corpus action the grandmother contended that the child was domiciled in Massachusetts, and that that state alone had jurisdiction to determine custody. In disposing of this claim, the Supreme Court of Illinois said:

"The jurisdiction of a state to regulate the custody of infants within its territory does not depend upon the domicile of the child. It arises out of the power that every sovereignty possesses as *parens patriae* to every child within its borders to determine its status and custody that will best meet its needs and wants. * * * The residence within the state suffices even though domicile may be in another jurisdiction."

For similar rulings in other states, see *Stearns, Admr., v. Allen*, 183 Mass., 404, 67 N. E., 349, 97 Am. St. Rep., 441; *Rizo v. Burruel*, 23 Ariz., 137, 202 P., 234, 19 A. L. R., 823; *Taylor v. Collins*, 172 Ark., 541, 289 S. W., 466; *Appeal of Woodward*, 81 Conn., 152, 70 A., 453; *Hopkins v. Gifford*, 309 Ill., 363, 141 N. E., 178; *Kenner v. Kenner*, 139 Tenn., 211, 201 S. W., 779, L. R. A. 1918E, 587; *Sheehy v. Sheehy*, 88 N. H., 223, 186 A., 1, 107 A. L. R., 635; *White v. White*, 77 N. H., 26, 86 A., 353; *Goldsmith v. Salkey* (Tex. Civ. App.), 115 S. W. (2d), 778.

The foregoing authorities establish only that Ohio has the inherent authority to decide the question of custody. To the extent that the statute law has limited that authority, we must, of course, follow the mandate of the Legislature. Petitioner relies on Section 2111.02, Revised Code, for such a limitation. That section, so far as pertinent herein, provides as follows:

"When found necessary, the Probate Court on its own motion or an application by any interested party shall appoint a guardian of the person, the estate, or both, of a minor, incompetent, habitual drunkard, idiot, imbecil, or lunatic or a guardian of the estate of a confined person; provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement therein."

It is urged by the petitioner that the word, "resident," should be interpreted as synonymous with "domicil," and that in Ohio the Probate Court can not appoint a guardian for a person not domiciled in Ohio unless he has a "legal settlement" in Ohio.

We do not ascribe this meaning to the word, "resident," as it is used in this section. Rather, we believe it is to be given its ordinary meaning, that of indicating simply a place of dwelling within the state. We recognize that "residence" is often interpreted as the equivalent of "domicil." See Reese and Green, That Elusive Word, "Residence," 6 Vanderbilt Law Review, 561. Such an interpretation here, however, would unnecessarily restrict the power of our Probate Court to deal with minor children. It would result in some instances in depriving the court of the power to determine custody of a child who has no family in another state and who has his only settled connection in Ohio—deprive it of the power simply be-

cause the surviving parent died domiciled some place other than Ohio. We do not believe that the General Assembly had any such intention when it enacted Section 2111.02.

This interpretation of the word is supported when we note the other persons to whom this section applies—the "incompetent, habitual drunkard, idiot, imbecile, or lunatic." Interpreting "residence" as the equivalent of "domicil" would prevent our courts from appointing a guardian of such a person, even though he was present and living in Ohio if the technical rules of domicil happened to make another state his domicil.

The final claim of the petitioner is that the Full Faith and Credit Clause of the Constitution of the United States (Section 1, Article IV) requires us to give such credit to the Louisiana decree of "tutorship" as will preclude us from giving any effect to the order of the Probate Court of Cuyahoga County. The Louisiana decree was entered without jurisdiction over the person of the respondent or the child. We are, therefore, not required to give such effect to that decree as to require the respondent to deliver the child to the petitioner. This is the philosophy underlying *May v. Anderson*, 345 U. S., 528, 97 L. Ed., 1221, 73 S. Ct., 840. See, also, *Cunningham v. Cunningham*, 166 Ohio St., 203, 141 N. E. (2d), 172; *New York, ex rel. Halvey, v. Halvey*, 330 U. S., 610, 91 L. Ed., 1133, 67 S. Ct., 903.

Our conclusion from the foregoing is that the Probate Court of Cuyahoga County did have jurisdiction to enter its decree of guardianship, and that the Full Faith and Credit Clause of the United States Constitution does not preclude our giving effect to that decree. It follows that such jurisdiction of the Probate Court is plenary and ex-

clusive. *Shroyer, Gdn., v. Richmond,* 16 Ohio St., 455; *In re Clendenning,* 145 Ohio St., 82, 60 N. E. (2d), 676.

The judgment of the Court of Appeals is, therefore, reversed and final judgment rendered for the respondent.

Since the error which is the basis of this reversal is apparent from the entry of the Court of Appeals, it is not necessary to our decision that there be a bill of exceptions. The motion of appellee to dismiss the appeal is, therefore, overruled.

Judgment reversed.

DECISION OF THE SUPREME COURT OF OHIO OVERRULING APPLICATION FOR REHEARING.

35767. *In re Donald Peter Fore, a minor*: *Ella V. Fore, Appellee v. Jakobine Toth, Appellant.* Cuyahoga County. Rehearing denied.

DECISION OF THE COURT OF APPEALS.

(No. 24536—Caption omitted.)

By Skeel, *PJ.*

This is an action invoking the original jurisdiction of the court wherein a petition has been filed seeking a writ of Habeas Corpus for the immediate release of Donald Peter Fore to the custody of the relator. The facts are not in serious dispute. The relator is the paternal grandmother of Donald Peter Fore, a minor of three years of age. She is a resident of Winnsboro, Louisiana. She is seventy-seven

years of age. The respondent is now, and has been since her marriage to William Toth in 1954, a resident of Cleveland. She is a citizen of Germany and has not yet petitioned for United States citizenship. Donald Peter Fore is the son of Donnie Ray Fore and Franziska Anna Fore, now deceased, both parents having died in a common accident in Ingrandes, France, September 7, 1957. The respondent is the sister of Franziska Anna Fore.

Donnie Ray Fore was born in Winnsboro, Louisiana, December 19, 1922. He enlisted in the Army of the United States on July 8, 1941, and was continuously in the Military Service from that time until his death. His last enlistment was on May 3, 1956. The place of this enlistment, as indicated by the military records, was Ingrandes, France, where he was then stationed. In this enlistment, as in all previous enlistments, he gave his home address as Winnsboro, Louisiana. Donnie Ray Fore, during his military service, attained the rank of Master Sergeant and at the time of his death on September 7, 1957, was serving in the Quartermaster's Depot, Ingrandes, France. Sergeant Donnie Ray Fore was married in Goeggingen, Germany, August 6, 1952. Donald Peter Fore was born in the Military Hospital at Fort Lee, Virginia, on October 10, 1954.

Immediately after the death of Sergeant Donnie Ray Fore and his wife, Donald Peter Fore was cared for by the family of Master Sergeant Gross until October 24, 1957, when the respondent, who had flown to Germany after receiving notice of her sister's death on September 14, 1957 (notice having been received from Mrs. W. C. Lee, sister of Donnie Ray Fore, who lived in Louisville, Mississippi), took possession of the child from an army officer. The respondent was then at the home of her parents in Germany.

After the respondent obtained possession of the infant, Donald Peter Fore, from the army representative, she

brought him to the United States on November 18, 1957. Upon arrival in New York, she was served with a petition seeking a writ of Habeas Corpus for the release of the infant. This proceeding was instituted there by Ida Fore Tillery, a resident of Mississippi and who was a paternal aunt of Donald Peter Fore. The record shows that the writ was denied on November 25, 1957.

The respondent then brought Donald Peter Fore to Cleveland, Ohio, where he has since been maintained in her household.

On December 2, 1957, the respondent filed an application for letters of guardianship, alleging that the parents of Donald Peter Fore, aged three, October 10, 1957, residing at 9006 Laisy Avenue, Cleveland, Ohio, were deceased, and naming the maternal grandparents in Germany and this relator, Ella Fore, paternal grandparent, residing in Louisiana, as next of kin. The application shows that the applicant (respondent here) is the maternal aunt and that the minor's property consists of government insurance on the life of the deceased father. This application was granted forthwith without notice to anyone and letters of guardianship issued upon posting a bond in the sum of $4,000. The probate file discloses a letter from a lawyer in Germany, employed by respondent to assist her in getting possession of the child, advising immediate action in securing an order of guardianship in the Probate Court of the respondent's residence, which letter included a copy of the journal of the Supreme Court of New York, County of Queens, dismissing the application for a writ of Habeas Corpus.

On April 11, 1958, the relator filed a petition in the Fifth District Court, Parish of Franklin, Louisiana, seeking an order of "tutorship" of the person of Donald Peter Fore and the right to the effects of said minor under the

Law of Louisiana. The petition sets out that Ella Vernon Fore (relator herein) is a resident of the Parish of Franklin, State of Louisiana; that she is the mother of Donald (Donnie) Ray Fore, the father of the minor here concerned; that the father and mother of said minor died in a common accident in France where the father was serving as a member of the Army of the United States; that he had been a member of the Armed Forces of the United States since 1941; that his home and domicile when he entered the Armed Services was the Parish of Franklin, Louisiana, where it has remained ever since and until his death, and that the domicile of the minor continued after the death of his parents in the Parish of Franklin and State of Louisiana.

Some reference in this petition is made to the fact that after being consulted by the Army concerning the child after the death of its parents, she consented to an application being made by Ida Fore Tillery, a sister of the deceased, Donald Ray Fore, to seek guardianship of such minor, which application was filed October 18, 1957, in the Fourth Chancery District Court of Mississippi, and decree entered by that court appointing Ida Fore Tillery Guardian. It is also set out in said petition that on October 25, 1957, the United States Army wrongfully delivered physical possession of Donald Peter Fore to the respondent who was then in Germany and that she brought said infant to Cleveland, Ohio, where she now has physical possession of such child and wrongfully refuses to deliver the child to the petitioner.

Upon hearing of the relator's petition for "tutorship" on April 11, 1958, the court appointed Ella Vernon Fore, guardian of said minor, Donald Peter Fore, as is shown by the record of such proceedings introduced in evidence in this case.

From the evidence, there can be no question but that the domicile of Donnie Ray Fore was Winnsboro, Parish of Franklin, Louisiana, during his entire life. This was his domicile when he enlisted in the United States Army and there is no evidence that he, at any time during his sixteen years of service prior to his death, ever signified an intent to change such domicile.

In Vol. 18, page 171, Sec. 17 *O. Jur.* 2d, under the title "Domicile" it is said:

> "* * * Absence from home for years, where at the time of leaving there was an intention to return, does not, unless in the meanwhile that intention was destroyed by some unequivocal act signifying a purpose to change the domicile, defeat one's right to claim his former residence as if it had never been interrupted by his absence. On no other principle could there be secured to officers in the Army and Navy on duty, public officials abroad and travelers in foreign parts, the right to enjoy on their return the privilege of voting where they had always resided or to claim the protection of their property from unlawful seizure in their absence. * * *"

In the case of *Glassman v. Glassman*, 75 Oh. Ap. 47, 60 N. E. 2d 716, the court said in the second paragraph of the syllabus:

> "2. The domicile of a person entering the armed forces of the United States remains the same throughout service in such forces unless a new domicile is voluntarily selected by such person."

On the facts of the case just cited, the rule set forth in paragraph four of the syllabus is not applicable here. The general rule is that where the husband has a fixed domicile recognized as such, the wife's domicile is that of her husband.

The facts are very clear that the respondent set out while still in Germany to keep Donald Peter Fore as her child regardless of the wishes of other members of the family, even as to those who under the law of the state of the child's domicile would have a prior right to such protective custody. The child's domicile was unquestionably in the Parish of Franklin, Louisiana, U. S. A., at the time of and since the death of his parents which occurred in a common accident while his father was in the Armed Services. This is true for two reasons, first because a minor's domicile is that of his father and second because courts hold that an infant takes the domicile of his paternal grandparents upon the death of both parents. See *Lehmer v. Hardy, et al.*, 294 Fed. 407.

The claim that the court is acting on behalf of the State of Ohio as "parens patriae" *under which theory* mere residence of the child within the state would suffice to give the judge jurisdiction to adjudicate what is for the best interests of the child is not applicable here. The respondent brought the child here seeking the protection of this state in her attempt to keep the exclusive custody of the child for her own purposes. There has been as yet no contest as to what is for the best interests of the child, nor could such question be litigated in this state on the undisputed facts here presented. Does the respondent suggest that the state of the child's domicile, Louisiana, is incapable of seeing to its welfare? Does the respondent seek, should disaster again strike, to burden this state with the continued care of the child or would she then attempt to surrender his custody to the state of his domicile? The suggestion that the relator, being seventy-seven years of age, is incapable of caring for the child, is not supported by the record in this case. The facts are that Ella Fore has raised nine

children and one grandchild, some of whom have had very acceptable army careers.

In 4 *A. L. R.* 2d, beginning at page 7, is an annotation to the case of *Wicks v. Cox*, 208 S. W. 2d 876. On page 14 in dealing directly with the question here presented, it is said:

> "Another theory which guides the courts' thinking is that a custody award affects the status of the child—a permanent relationship, jurisdiction over which is in the court of the state of the child's domicil, and in that court only. Courts for support of this theory often cite and quote 2 Beale, Conflict of Laws, para. 144.3, where it is said: 'Since custody of a child by one parent carries with it domicil and a domestic status, jurisdiction to give the child to one parent or the other depends in principle on the domicil of the child; and a state which is the temporary residence of the child, not the domicil, cannot confer the right to custody. A fortiori a decree for custody rendered in a state where the child is neither resident nor domiciled is void for lack of jurisdiction.' This view is supported in the American Law Institute, Restatement, Conflict of Laws, para. 117 and 145-148. Theoretically, it would seem that the court of the child's domicil should have power to determine its custody, since that sovereign is especially interested in the child's welfare. 24 Harv. L. Rev. 142."

In the case here being considered, it must be remembered that the controversy is not between parents. As is indicated in the annotation just cited, many times in disputes between husband and wife or in protecting an abandoned child, residence is sufficient to vest a court with jurisdiction. The legal right to the custody or the responsibility for the support and care of Donald Peter Fore as between the remaining members of his family has never been the subject of an action before a court of competent jurisdiction. The respondent just took the child without legal right or

authority and with total indifference to all others equally entitled or with prior right to be considered in a proper action to be adjudged the guardian of such minor child.

The statute of Ohio authorizing the appointment of guardians is §.2111.02 R. C. This section circumscribes the authority of the courts of this state in making such appointment to cases where the ward is "a resident of the county or has a legal settlement therein." There is no claim here that Donald Peter Fore had a "legal settlement" in Cuyahoga County nor do the facts justify a determination that he was, when the action was commenced, a resident of this state. The respondent had no authority to establish a residence here for such minor. In the case entitled *In the Matter of the Petition for the Appointment of a General Guardian of Maude and Mabel Hubbard, Infants*, 82 N. Y. 90, the court said in the headnotes:

> "The Supreme Court has no jurisdiction to appoint a guardian for an infant where the infant is not within the jurisdiction, or domiciled there, and has no property therein.
>
> "It seems, that if an infant is a resident within the jurisdiction, although not domiciled and having no property there, the court has power to appoint a guardian; so, also, property gives jurisdiction to appoint a guardian thereof, although the infant is out of the jurisdiction and a resident abroad.
>
> "The bringing of an infant, however, into this State by stratagem for the purpose of giving jurisdiction, will not avail.
>
> "On application for the appointment of a guardian for two infants, it appeared that the legal domicile of their father was in Rhode Island. One of them was, at the time of the application, in that State, and the other had been, a few days prior to that time, secretly taken without the knowledge of her father or her relatives from Rhode Island, and brought into this State

for the purpose of bringing her within the jurisdiction of the court, and in aid of the proceedings. Neither of the infants had any property in this State. The Special Term appointed a guardian residing in this State; the General Term, on appeal, reversed the order and appointed a resident of Rhode Island as guardian. Held, that both appointments were erroneous; that the legal domicile of the infants was in Rhode Island, as the domicile of the father was the domicile of his infant children; and that the Supreme Court had no jurisdiction."

And in the case of *Lehmer v. Hardy, et al.*, 294 Fed. 407, it is said in the headnotes:

"1. Where the maternal and the paternal grandparents of a minor, whose parents had been killed, resided in New York, a decree of the Supreme Court of the District of Columbia purporting, under Code D. C. § 150, to appoint a guardian of such minor's person rendered in her absence without notice, held void, though the District of Columbia had been the domicile of her parents.

"2. Upon the death of a minor's parents, the paternal grandfather becomes her natural guardian, and by virtue of the fact that he then stands in loco parentis he has the right to change or fix the minor's domicile.

"3. A minor, like any other person, is entitled to the protection of the laws of the state or territory in which he abides."

and on page 411, the court said:

"3. Let that be as it may, however, we are quite convinced that the courts of the District of Columbia have no authority to appoint guardians of the persons of infants who do not reside and are not domiciled within their territorial jurisdiction. A minor, like any other person, is entitled to the protection of the laws of the state or territory in which he abides, and it

seems to be well-settled that only the courts of the domicile have jurisdiction to appoint a guardian of the person of a minor. Wharton on Conflict of Laws, 259; Harding v. Weld, 128 Mass. 590, 591; In re Benton, 92 Iowa, 202, 60 N. W. 614, 54 Am. St. Rep. 546; In the Matter of Hubbard, 82 N. Y. 90; Lamar v. Micou, 112 U. S. 470, 5 Sup. Ct. 221, 28 L. Ed. 751."

In the case of *Shorter v. Williams*, 74 Ga. 539, the syllabus provides:

"Where application was made for the guardianship of certain minors in the county where their father had lived and died, and where they were then domiciled, the court of ordinary thereby acquired jurisdiction to hear, determine and grant letters of guardianship for their persons and property; and this jurisdiction could not be divested or rendered nugatory by the removal of the minors to the state of Alabama by their sister, and the grant of letters of guardianship to another by the probate court of that state, pending the application in Georgia."

See also *Munday v. Baldwin*, 79 Ky. 121.

The many cases on this subject, while not based on identical facts as are here presented, hold under similar circumstances that the domicile of an infant is that of its parents; that upon the death of both parents, the paternal grandfather, or if not living the paternal grandmother, becomes the natural guardian of a minor child; that such natural guardian has the power on the death of both parents to change the domicile of a minor grandchild to that of his own, and a court of another jurisdiction has no power to oust the prior right of the court of the domicile of the infant thus situated from determining what is for the child's best interest and appointing a fiduciary of the infant's person and estate. Nor can the court of another jurisdiction take away the right of the paternal grand-

parent who, upon the death of both parents, stands in loco parentis to such child.

Here both parents were killed in a common accident in France only a very short time before the proceedings herein were commenced. The respondent got possession of the infant in Germany from an army officer. She is a maternal aunt. There are also two paternal aunts of equal standing in the United States, one being the relator in the unsuccessful proceeding in Habeas Corpus filed in New York when the child arrived in this country in the possession of the respondent, and who had an order of guardianship for the minor issued in a proceeding in the courts of Mississippi prior to the New York case. The dismissal of the petition for a writ of habeas corpus in the New York case (although the record is silent on the question) could have been for the same reason that the respondent should not prevail here. That is, the authority depended on as the basis for seeking custody was not from the state of the child's domicile. The person nearest in consanguinity in the United States is the relator in this action. She is the paternal grandmother and a resident of, and holds a decree granting her the right of "Tutorship" of the child from the courts of the Parish and State of his domicile. Such court is the only judicial tribunal authorized to determine, under the facts in this case, the right of the custody of Donald Peter Fore.

From the foregoing facts, it is clear that the custodial order of the Probate Court of Cuyahoga County depended on by the respondent was void when made for want of jurisdiction of the cause of action and of no legal effect and the writ here prayed for should issue.

APPENDIX B.

OHIO REVISED CODE SECTION 2111.02.

§ 2111.02. Appointment of guardian.

When found necessary, the probate court on its own motion or an application by any interested party shall appoint a guardian of the person, the estate, or both, of a minor, incompetent, habitual drunkard, idiot, imbecile, or lunatic or a guardian of the estate of a confined person; provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement therein.

If a person is incompetent due to physical disability, the consent of the incompetent must first be obtained before the appointment of a guardian for him.

The guardian of an incompetent, habitual drunkard, idiot, imbecile, lunatic, or confined person, by virtue of such appointment shall be the guardian of the minor children of his ward, unless the court appoints some other person as their guardian.

When the primary purpose of the appointment of a guardian is, or was, the collection, disbursement, or administering of moneys awarded by the veterans administration to the ward, or assets derived therefrom, no court costs shall be charged in the proceeding for the appointment or in any subsequent proceedings made in pursuance of the appointment, unless the value of the estate, including the moneys then due under the veterans administration award, exceeds one thousand five hundred dollars.

Page's Ohio Revised Code.

APPENDIX C.

JUDGMENTS OF THE SUPREME COURT OF OHIO.

Wednesday, December 24, 1958

Journal 42, Page 735

Motion by Appellee to dismiss appeal. Cuyahoga County.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Wednesday, December 24, 1958

Journal 42, Page 741

Appeal from the Court of Appeals of Cuyahoga County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and final judgment is rendered for respondent.

It is further ordered and adjudged that appellant recover from appellee her costs expended in this Court and in the Court of Appeals taxed at $ _____.

Ordered, That a special mandate be sent to the Court of Appeals of Cuyahoga County, to carry this judgment into Execution.

Wednesday, January 14, 1959

Journal 43, Page 11

Application for Rehearing.

Upon consideration of the above application for re-hearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

JUDGMENT OF THE COURT OF APPEALS.

(No. 24536—caption omitted.)

This cause coming before this Court for hearing upon a writ habeas corpus directed upon the application of Ella V. Fore, for the body of Donald Peter Fore, a minor, aged three years, and thereupon, the proofs and allegations of the parties being heard and considered, a transcript of testimony taken before a Master Commissioner appointed by this Court and the Memoranda of Law submitted by the parties hereto, the Court finds that the said Donald Peter Fore is illegally detained by the said Jakobine Toth in her custody by reason that the order entered on December 2, 1957 by the Probate Court of Cuyahoga County, Ohio in Doc. 555, No. 551269 was void *ab initio* for the reason that the Court did not have jurisdiction to appoint the said Jakobine Toth the guardian of the person and estate of said Donald Peter Fore and that full faith and credit is to be accorded the judgment of the Fifth District Court, Parish of Franklin, State of Louisiana, issued the 11th day of April, 1958 appointing the said applicant, Ella V. Fore, guardian of the person and estate of the said Donald Peter Fore.

It is therefore ORDERED that the said Donald Peter Fore be and hereby is discharged from the custody of the said Jakobine Toth, and that the said Donald Peter Fore be and hereby is given to the custody of his true and lawful guardian under the laws of the State of Louisiana, Ella V. Fore.

It is further ORDERED and DECREED that the said Jakobine Toth deliver forthwith the possession of the body of the said child to Ella V. Fore, or one of her attorneys of record in this matter, and pay to or turn over to the said Ella V. Fore, as the lawful guardian of the said Donald

Peter Fore, all moneys, documents, funds, claims, papers, insurance policies, chattels and property of every kind and description which she acquired or may acquire or has asserted any right, title or interest in or to as the purported guardian of such child, and that she revoke any powers of attorney or other instruments executed by her as such purported guardian, and account to Ella V. Fore for any moneys expended by her accruing to her as such purported guardian.

Costs to Respondent, Jakobine Toth.